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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 387 26

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALCEA BAND OF TILLAMOOKS, ET AL.,
Respondents

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Opinion Below

The opinion of the Court of Claims (R. 21-83) is reported in 59 F. Supp. 934.

Statement of the Controversy

Since some of the findings relate to respondents who were denied recovery and this appeal is limited to those who recovered, we quote in Appendix p. 4-17 the salient parts of the findings relating to the question raised by this appeal. We shall use the word respondents in the brief as meaning the respondents who were successful below. There was no appeal by the unsuccessful respondents who were held not to have come within the jurisdictional act.

The findings show that respondents had original Indian title by immemorial occupancy and possession to the de-

scribed lands; that the government started in to obtain the title by treaty but before its ratification because of the trouble with other Indians the lands were quickly acquired by the involuntary removal of the Indians by the government; that such lands were taken by the Government for a public use without compensation and that such taking was thereafter ratified and confirmed and became an appropriation of the lands under the power of eminent domain. *Shoshone Tribe* v. *United States*, 299 U. S. 476, at 495; *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119.

The jurisdictional act (Appendix 1) contained two separately numbered clauses.

Clause (a), not involved herein, provided for the recovery on claims growing out of treaties; and Clause (b) conferred jurisdiction to hear, adjudicate and render judgment in and upon "any and all legal and equitable claims arising under or growing out of the original Indian title, claim or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described" in the unratified treaty of August 11, 1855, "at and long prior to the dates thereof."

This land lay to the west of the treaty acquired lands between the Coast Range and the Pacific Ocean and embraced lands, a part of which the Court of Claims held were taken from respondents by the Government. The court held respondents had a right to recover (R. 84). Petitioner claims error on the ground that the Indian title was not specifically recognized by treaty or by act of Congress.

Judicial Definition of the Meaning of the Term "Original Indian Title"

This term has a definite meaning. As early as 1795 the term "Indian title" was used three times in Article IV of the treaty of Wyandot (August 3, 1795, 7 Stat. 49). That

term had been used many times before it was used in the jurisdictional act. It was used in describing original Indian occupancy claims as to this very territory in 1855: "• • • Idea suggested • • • that any white settler may rightfully take possession of any lands occupied by the Indians prior to the *extinguishment of their occupancy title.* This idea is too absurd to admit of a reasoned reply" 7 Op. Atty. Gen. 293, 299; Opinion below R. 75; see also *Buttz* v. *Northern Pac. R. R. Co.*, 119 U. S. 55; *U. S.* v. *Shoshone Tribe*, 304 U. S. 111, 116; 82 L. Ed. 1213.

The term "original Indian title" was the appropriate term. *Bates* v. *Clark*, 95 U. S. 204, 24 L. Ed. 471. In another case (approving *Bates* v. *Clark*, 95 U. S. 204, 24 L. Ed. 471) the Supreme Court says:

> "• • • This rule was applied in reference to the very question now under consideration in *Bates* v. *Clark*, 95 U. S. 204 (XXIV, 471) decided at the October Term, 1877. It was said in that case by *Mr. Justice* Miller, delivering the opinion of the court, that 'It follows from this that all the country described by the Act of 1834 as Indian country remains Indian country so long as the *Indians retain their original title* to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by Act of Congress.' In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, • • •" *Ex Parte: In the Matter of Kang-Gi-Shun-Ca*, 109 U. S. 556 at 561; 27 L. Ed. 1030 at 1032. (Italics supplied)

The respective titles, sovereign naked fee and Indian title, each carried "rights".

> "• • • Whilst thus claiming *a right* to acquire and dispose of the soil, the discoverers recognized a

right of occupancy or a usufructuary right in the natives. They accordingly made grants of lands occupied by the Indians, and these grants were held to convey a title to the grantees, subject only to the Indian *right of occupancy.* The chief justice adds that the history of America, from its discovery to the present day, *proves the universal recognition of this principle.*" *Buttz v. Northern Pac. R. R. Co.*, 119 U. S. 55, 67; 30 L. Ed. 330, 335. (Italics supplied)

The jurisdictional act, with the apt precision based upon the adudicated definitions, used the terms "Rights" (*U. S. v. Santa Fe and Pacific R .R. Co.*, 314 U. S. 339) and "Original Indian title" for parties to an "unratified treaty" which precludes the idea of treaty recognition. While the term "Indian title" might apply to a title which had grown out of a treaty reservation as well as the original Indian title, the term "Original Indian title" had a definite meaning and referred only to the Indian occupancy title which depended upon the fact of occupancy exclusive of recognition by treaty or act of Congress.

To further support the definition of "original Indian title" the jurisdictional act uses the language "occupied by the Indian tribes and bands described in the unratified treaties" (it was one treaty signed by various tribes on different dates) "at and long prior to the dates thereof" (R. 2).

Congress could not have couched the act in clearer, more definite or unambiguous terms.

Questions Submitted Are Judicial

There are no political questions submitted to the court. Those have already been decided by other branches of the Government. The first question to be decided was whether they should take the lands. The Government decided to do so. The second question to be decided was whether the

Government should acquire it by treaty, conquest or eminent domain. After starting to acquire the Indian lands by treaty the Government through its Indian Agency aided by the Army decided to take it over at once; and later the Government decided to confirm the taking by keeping the fruits thereof, and by subsequent laws and approved executive acts to further confirm the taking under the power of eminent domain. Having done so the next question was whether the Government should make compensation. This it might do by direct appropriation; or waiving sovereignty, lapse of time, statutes of limitation, and the doctrine of estoppel, submit it to the Court of Claims for an adjudication which should "settle the rights of the parties thereto both legal and equitable." This latter method was selected by the Congress.

Similar to Klamath Case

In the *Klamath* case, 304 U. S. 119 the Congress after many years had provided payment for the lands taken by the Government by eminent domain and obtained a full release from the Indians. In the absence of a proper jurisdictional act the courts were bound to this political decision. However, thereafter by act of Congress the release was waived and the Congress submitted to the Court of Claims the whole question of the taking and compensation; and, as in this case, the court rendered judgment in favor of the Indian tribe. This was a proper judicial question, made so by the act of Congress.

Even if some phases had been of a political nature, a jurisdictional act was proper in both the *Klamath* case and the present case. The clearest statement on that subject is in a Supreme Court opinion which we quote:

"• • • The laws under which we now adjudicate on the rights embraced in the treaty and its instruc-

tions, authorize and direct us to do it judicially, and give its judicial meaning and interpretation as a contract on the principles of justice and the rules of equity. When the construction of this treaty was under the consideration of the court in the case of *Foster and Elam* v. *Nelson* (2 Pet., 254, 99), it was under very different circumstances. The plaintiff claimed a title to the land in controversy under a Spanish grant prior to the treaty, which he alleged was confirmed by the eighth article; he stood simply on his right, without any act of Congress authorizing the suit, or conferring on the court any extraordinary powers. • • •

"'This court did not deem the settlement of boundaries a judicial but a political question—that it was not its duty to lead, but to follow the action of the other departments of the government; • • •

"• • • But this case assumes a very different aspect. The only question depending is whether the claimants or the United States are the owners of the land in question. *By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question which we are now bound to decide as between man and man,* on the same subject matter and by the rules which Congress themselves have prescribed, of which the stipulations of any treaty and the proceedings under the same, form one of four distinct ones. We must therefore be distinctly understood as not in the least impairing, but affirming the principle of *Foster* v. *Nelson.* As the law giving jurisdiction to hear and determine this case not only authorizes but requires us to decide it according to law of nations and the stipulations of the treaty, we shall consider 'that it has been very truly urged by the counsel of the defendant in error that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required and is never refused.'

• • • • • • • • • •

"Congress have disclaimed its decision as a political question for the legislative department to decide, and enjoined it on us as one purely judicial.

"* * * The United States do not come into court claiming this cession and renunciation as vesting them with the whole territory in full dominion, in their sovereign capacity, with liberty to confirm previous appropriations of parts of it or not, at their pleasure; but require us to finally decide between them and the claimants as grantees from the same grantor, which grant carries the title to the land. * * *" (*U. S.* v. *Arredondo et al.*, 6 Peters 691, 8 L. Ed. 547 at 554.) (Italics supplied)

If two persons each have separate and distinct rights in property, and one by superior power takes all the rights of the other, it is quite plain that the injured party has a claim against the other "as between man and man".

In the case of *United States* v. *Santa Fe Pacific R. R. Co.*, 314 U. S. 339, 86 L. Ed. 260, the court cites with approval the case of *Barker* v. *Harvey*, 181 U. S. 481, 45 L. Ed. 963, which shows that determination of the Indian title by occupancy can appropriately be delegated. The court says:

"These Acts did not extinguish any Indian title based on aboriginal occupancy which the Walapais may have had. In that respect they were quite different from the Act of March 3, 1851, 9 Stat. at L. 631, chap. 41, passed to ascertain and settle certain land claims in California. Under Sec. 13 of that Act 'all lands the claims to which shall not have been presented' to the commissioners, appointed to receive and act upon all petitions for confirmation of land claims, 'within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States.' This Court passed on that Act in Barker v. Harvey, 181 U. S. 481, 45 L. Ed. 963, 21 S. Ct. 690. The plaintiff there claimed under two Mexican grants. *The defendants were Indians who claimed a right of permanent occupancy;* but they had not presented their claims to the commissioners within

the time specified by Sec. 13. This Court held that as a result of that failure their claims were barred. And see United States v. Title Ins. & T. Co., 265 U. S. 472, 68 L. Ed. 1110, 44 S. Ct. 621, supra. *That is to say, the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy.*" (*U. S. v. Santa Fe Pac. R. R. Co.*, 314 U. S. 339, 86 L. Ed. 260, 271.) (Italics supplied.)

The question of fact that the Indian tribes had original Indian title was actually adjudicated in the case of *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; 82 L. Ed. 1219; 85 Ct. Cls. 451.

The second finding of the Court of Claims stated "In 1864 Plaintiffs held by immemorial possession a larger area of land • • •" which included the lands in litigation. *Klamath and Moadoc Tribes* v. *United States*, 85 Ct. Cls. 451 at 454. On appeal to the Supreme Court this Court stated: "The findings show: *In 1864 Plaintiffs held by immemorial possession* • • •. *The tract taken was a part of the reservation retained by plaintiffs out of the country held by them in immemorial possession* from which was made the cession by the treaty of Oct. 14, 1864. The clause declaring that the district retained should until otherwise directed by the President be set apart as a residence for the Indians and 'held and regarded as an Indian reservation' did not detract from the tribes' *right of occupancy.* The worth attributable to the timber was a part of the value of the land upon which it was standing. Plaintiffs were entitled to have that element of value included as a part of the compensation for the land taken." *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; at 122-123. (Italics supplied.)

While it is true there was treaty recognition in that case, yet the value of the lands was determined upon *the*

adjudication of a prior original Indian title by immemorial possession.

No Difference in Title Before and After Treaty Recognition

There is no difference between Indian title recognized by treaty and original Indian title.

> "When this grant was made, the right of occupancy of the Indian tribes in the territory including the reservation had not been extinguished. The fee was in the United States, subject to this right. This right is referred to by the Supreme Court of the United States as a 'title,' as a right 'as sacred as that of the United States to the fee. * * * This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purpose of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them.' U. S. v. Cook, 19 Wall. 593. For all purposes, therefore, save only that of private sale, the Indians were in fact the owners of these lands. And this right, title, or interest has never been surrendered by them. The treaty cedes to the United States all the right, title, and claim of the Indian tribes to all the country claimed by them, the same being described by boundaries which include the reservation. This section is followed by a proviso as follows: 'Provided, that the following described tract within the territory ceded by this treaty, shall, until otherwise directed by the president of the United States, be set apart as a residence for said Indians, and held and regarded as an Indian reservation.' Then follows a description of the reservation. It is argued that this cession extinguishes the Indian right to the entire Indian country, and the proviso establishes a new right, which, being new, is subordinate to the prior road grant. *The Indian right under the treaty, as to the particular lands, is precisely what it was before the treaty. By the terms of the*

treaty, the fee remains in the government, and the right of occupancy in the Indians, as before." (*California & Oregon Land Co.* v. *Worden*, 85 Fed. Rep. 94 at 94-97.) (Italics supplied.)

The full power rests in the Government to extinguish Indian title under treaty reservation just as it does to extinguish original Indian title.

> "The power existed in Congress to invade the sanctity of the reservation and disregard the guarantee contained in the treaty of 1820, even against the consent of the Indians, party to that treaty, and as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass the effect of the act was to extinguish so much of the Indian reserve as was embraced in the grant for canal purposes." (*Spalding* v. *Chandler*, 160 U. S. 394.)

The power to extinguish, by such method as it chose, the *recognized* Indian title to lands still remained in the Government. Such power did not bar claims growing out of the taking of such lands. *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; *Shoshone Tribe* v. *U. S.*, 299 U. S. 476.

Therefore the same power to extinguish the original Indian title does not militate against the claim in the case at bar. The "distinctive obligation," arising out of the guardianship status, forbade the taking for its own use without compensation of the property of the ward even though the *power* to do so was present. *Seminole Nation* v. *United States*, 316 U. S. 286 at 296 and cases cited; *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; *Shoshone Tribe* v. *U. S.*, 299 U. S. 476.

That the guardianship status exists with reference to lands held by original Indian title is shown by the case of *United States* v. *Santa Fe Pacific R. R. Co.*, 314 U. S. 339.

The Right to Take the Indians' Lands Without Compensation Did Not Grow Out of the Government's Title of Naked Fee.

No new question is presented on this appeal.

The salient points have all been many times decided. The complete title to Indian tribal lands, whether held under aboriginal title or by reservation, are concurrently shared by the Indian tribe and the United States Government. The Indian part in such title is a right of perpetual occupancy as sacred as the fee simple. The United States part in such title is the naked fee.

For more than a century this court has repeatedly recognized that original Indian title creates legal and equitable rights. *Johnson* v. *M'Intosh*, 8 Wheat. (U. S.) 543, 5 L. Ed. 681; *U. S.* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 86 L. Ed. 260; *U. S.* v. *Shoshone Tribe*, 304 U. S. 111, 82 L. Ed. 1213; *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 82 L. Ed. 1219; *Worcester* v. *Georgia*, 6 Pet. (U. S.) 515, 8 L. Ed. 483; *Mitchel* v. *United States*, 9 Pet. (U. S.) 711, 9 L. Ed. 283; *Chouteau* v. *Molony*, 16 How. (U. S.) 203, 14 L. Ed. 905; *Holden* v. *Joy*, 17 Wall. (U. S.) 211, 21 L. Ed. 523; *Buttz* v. *Northern P. R. Co.*, 119 U. S. 55, 30 L. Ed. 330, 7 S. Ct. 100; *Cramer* v. *United States*, 261 U. S. 219, 67 L. Ed. 622, 43 S. Ct. 342; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. Ed. 634; *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. Ed. 440; *Spalding* v. *Chandler*, 160 U. S. 394, 40 L. Ed. 469, 16 S. Ct. 360; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. Ed. 954, 22 S. Ct. 650.

Such rights are legally enforceable against everyone except the sovereign who cannot be sued without his consent. Where such consent has been given, as in this case, they are enforceable against the United States in the same manner and to the same extent as against anyone else.

The United States has the sovereign power to go beyond the rights growing out of its title. This power is because "the King can do no wrong," and the Government cannot be sued without its consent, but any exercise of power in violation of the Indians' rights can form the proper subject matter for a jurisdictional act.

To be sure the exercise of such arbitrary sovereign power is effective for all purposes and it was effective here. By the use of such power the Government effectually acquired the full title to the Indians' land. It passed it on to its grantees and no one could question their title. That was true in the *Shoshone* case where the Government without let or hindrance extinguished title to one-half interest in the Shoshone's lands. However, the act of the Government in that case was made the subject of a jurisdictional act and the Indians recovered. *Shoshone Tribe* v. *United States*, 299 U. S. 476.

In the instant case the Indians had complete original Indian title. The Government had the naked fee. The Government dispossessed the Indians and took their lands for a public use without compensation. This was not in pursuance of rights growing out of the naked fee. They could not sue the Government for thus violating their rights. They had a valid but unenforceable claim against the Government. The jurisdictional act gave Respondents the right to assert the claim by proving their original Indian title. This the Court's unchallenged findings show was done.

After the Government has waived its sovereignty and consented to be sued, it is wholly untenable to permit a successful defense based on the exercise of its arbitrary sovereign power.

Petitioner contends there is a difference between a title in a reservation recognized by treaty or act of Congress on the one hand and Indian title by aboriginal possession on the other. The former could not be any stronger than the

latter because it is as sacred as the fee. Petitioner grants that the taking by eminent domain of the land held under the recognized title is a proper subject for claim (Pet. p. 12). Petitioner then states that "the extinguishing of aboriginal Indian title creates at most only a moral obligation." In the *Shoshone* case the Government contended that the right to use and occupy the land of the reservation which was granted by the treaty did not include the ownership of the timber and minerals but the court there said that "the tribe *had the right of occupancy with all its beneficial incidents; that the right of occupancy being the primary one and as sacred as the fee,* division by the United States of the Shoshones' right with the Araphahoes was an appropriation of the land pro tanto; that although the United States always had legal title to the land and power to control and manage the affairs of the Indians it did not have power to give to others or to appropriate to its own use any part of the land without rendering or assuming the obligation to pay, just compensation to the tribe, for that would be not the exercise of guardianship or management, but confiscation." (Italics supplied.)

The Supreme Court has indicated that whether the land was in a reservation or unceded lands does not change the title. We quote:

> "While its boundaries were indicated, while it was called the Red Lake Indian reservation, yet the acts referred to did not purport to change the rights of the Indians or the government, neither did they in fact change them. The land remained on March 4, 1890, land the fee of which was in the United States, but subject to the Chippewa Indians' right of occupancy. No patent had ever been executed by the United States to the Indians in severalty or to the tribe at large. The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract."

Minnesota v. *Hitchcock*, 46 L. Ed. 954, 963; 185 U. S. 373, 388.

The existence of rights growing out of title by aboriginal possession without recognition is so clearly stated in the brief of the United States in the case of *United States* v. *Santa Fe R. R. Co.*, 314 U. S. 339, that we respectfully refer the Court to that brief. The presentation of authorities and the reasoning in the Government's brief therein constitute one of the clearest statements on the subject.

This brief of the Government was in answer to the precise position now taken by the Petitioner in this case.

The contention of the Santa Fe Pacific Railroad, which the Supreme Court rejected, was stated in its brief as follows:

> "• • • political recognition is necessary to the creation of legal Indian possessory right, *Barker* v. *Harvey, supra, Hayt* v. *United States*, 38 Ct. Cls. 455, *Duwamish et al., Indians* v. *United States*, 79 Ct. Cls. 530 (certiorari denied, 295 U. S. 755), *Coos Bay Indian Tribe, et al.* v. *The United States*, 87 Ct. Cls. 143, 152-3 (certiorari denied, 306 U. S. 653), • • •."

It will thus be seen that the Santa Fe Pacific Railroad brief even cited the cases relied upon to support the petition in the case at bar.

In a vigorous reply brief in the *Santa Fe* case the Government again reviewed the cases cited in its original brief and then adds the following footnote:

> "The only judicial authority that is cited by respondent for the rule that Indian title does not exist in the absence of specific affirmative recognition, is a dictum by the Court of Claims in *Hayt* v. *United States*, 38 Ct. Cl. 455, 464 (1903), quoted in Respondent's brief, pt. 1, at p. 33, and again at p. 93, that 'Indian country' in New Mexico and Utah was limited to formal reservations. This view (which seems to have been largely

based on the opinion of this Court in *United States* v. *Joseph*, 94 U. S. 614 (1876), was definitely repudiated in *United States* v. *Candelaria*, 271 U. S. 432 (1926), and *United States* v. *Chavez*, 290 U. S. 357 (1933). Any inference from this dictum that the Court of Claims intended to deny these Indians a possessory right in the lands they aboriginally occupied is refuted by the opinion of the Court of Claims itself in *Ute Indians* v. *United States*, 45 Ct. Cl. 440 (1910), where it was held that relinquishment of aboriginal possessions was valid consideration for an agreement by the United States." (Reply Brief of the Government in *United States* v. *Santa Fe Pacific Railroad Co.*, p. 34.)

This Honorable Court sustained the position outlined in the brief of the United States and held:

"Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer Case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.' 261 U. S. at 229, 67 L. Ed. 626, 43 S. Ct. 342." *United States* v. *Santa Fe R. R. Co.*, 314 U. S. 339.

The *Santa Fe* case was an action taken by authority of the Attorney General without any authority by Congress and the Court adjudicated the title. This shows that the title does not depend upon congressional recognition.

Legislative and Executive Construction

The report of the Secretary of Interior and the passage of the bill by Congress indicate that both the Executive and the Legislative branches of the government construed this act as providing that the Indians proving aboriginal title should be paid for such lands. The report by Honorable Harold L. Ickes, Secretary of Interior, recommends

the passage of the bill bearing the present language and states:

> "The Indians are of the belief that their claims are valid and that the provisions of the ratified treaties have not been fully carried out. *They are also of the opinion that they should be paid for the lands under the unratified treaty.*" (Italics supplied.)

This was quoted in the reports on the bill by both House and Senate Committees. H. Rep. No. 1085 and S. Rep. No. 795, 74th Cong., 1st Sess.

The Jurisdictional Act Held Sufficient

We desire to dispute sharply the Petitioner's statement in a footnote of the petition that in the three cases cited "The Court of Claims found it unnecessary to pass upon the government's liability as a matter of law * * *" (Petition, p. 11).

The cited cases do not support Petitioner's position. On the contrary the cases definitely show that where the Jurisdictional Acts granted the power, the Court would adjudicate the rights acquired by occupancy.

The Jurisdictional Act in the Coos Bay Tribe of Indians v. *U. S.*, 87 Ct. Cls. 143, *is precisely the same as in the case at bar* as regards the point under discussion. Now bearing that in mind let us examine it.

The whole opinion was based upon the assumption that the Jurisdictional Act gave the Court the authority to adjudicate the rights based upon Indian occupancy. Without any suggestion by the Court that it did not have such right, the evidence was carefully analyzed by the Court and held to be insufficient to support the allegations of the complaint. There was no suggestion that the complaint was not good.

The Court was demonstrating, first, that the Government had not recognized the Plaintiff's title to this land (which

would have obviated further proof) and therefore that possession must be proved; and second, that the proof was insufficient.

Now consider the case of *The Wichita Indians et al.* v. *U. S.*, 89 Ct. Cls. 378. The holding there was not that a tribal claim to any particular lands must be based upon a treaty, statute or other formal governmental action, but that the Jurisdictional Act did not authorize the Court to make adjudication on aboriginal occupancy.

However, the case of *Wichita Indians, et al.* v. *U. S., supra,* in emphasizing the lack of proper language in the Jurisdictional Act there pointed to the case of *The Assiniboine Tribe* v. *U. S.*, 77 Ct. Cls. 347, and the *Coos Bay Indian* case, 87 Ct. Cls. 143, as illustrations of jurisdictional acts which specifically confer jurisdiction and authority to adjudicate and render judgment on an occupancy title. We quote from the *Wichita* case:

> "In *Assiniboine Indian Tribe v. United States, supra,* the jurisdictional act, as amended, specifically conferred jurisdiction and authority to adjudicate and render judgment on a use and occupancy title by immemorial possession. This court held that a claim to title to lands based on immemorial possession could not be sustained where the evidence showed that other tribes similarly occupied and possessed such territory. In *Coos Bay Tribe of Indians case, supra,* the jurisdictional act also specifically authorized jurisdiction and entry of judgment upon the claim 'arising under or growing out of the original Indian title, claim, or rights of the said tribe * * *.'" (*Wichita Indians et al.* v. *U. S.*, 89 Ct. Cls. 378 at 419.)

Therefore unless this Court should overthrow this logical line of decisions the holding sought for by the Petitioner must be denied. This for the reason that the Court in the *Wichita* case expressly holds that the Jurisdictional Act in the *Coos Bay* case, "specifically authorized jurisdiction and

entry of judgment upon," such a claim. The language of the Jurisdictional Act in the case at bar is exactly the same as that quoted by the Court in the *Coos Bay* case.

We also wish to dispute Petitioner's statement in the same footnote (Pet. p. 11) that the *Duwamish* case, 79 C. Cls. 530, supports its position.

The jurisdictional act in that case dealt only with certain treaties or acts of Congress, and the Court of Claims held that it had no jurisdiction to adjudicate claims not specifically mentioned.

The Court below answered Petitioner's inaccurate contention by saying: "The Duwamish case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of a suit and rendition of judgment for compensation on the basis of such original title" (R. 76).

It is crystal clear that the Court in the *Duwamish* case was dealing with a Jurisdictional Act which did not, as in the *Coos Bay* case and the present case, specifically confer jurisdiction and authority to adjudicate and render judgment in a claim arising under or growing out of the original Indian title, claim or rights of said tribe.

Wherever the Jurisdictional Act has conferred such jurisdiction the Court of Claims has not hesitated to exercise it and the distinction between a Jurisdictional Act giving the right and one failing to give the right is illustrated quite clearly in *Wichita Indians* v. *U. S.*, 89 Ct. Cls. 378 at 419.

See also cases cited in the opinion of the Court of Claims in this case.

The opinion of the Court of Claims in this case is the clearest statement on the subject. We quote:

> "From the standpoint of the legal and equitable nature of a claim and the legal principles applicable thereto, the fundamental right of an Indian tribe to recover compensation for having been deprived by the

United States of the beneficial aboriginal ownership of land is no different in a case where the United States has consented to be sued on the basis of original Indian title from a case where the United States has consented to be sued on the basis of a claim arising under or growing out of a treaty, agreement, or act of Congress, except in the nature and degree of proof required to establish use and occupancy title. Where consent to be sued on the basis of original Indian title has been given, as in this case, occupancy of these Indians to the exclusion of other tribes necessary to establish aboriginal possessory title is a 'question of fact to be determined as any other question of fact.' *United States, as Guardian of the Hualpai Indians of Arizona*, v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339. Cf. *The Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347; *Coos (or Kowes) Bay, Lower Umpqua (or Kalawatset), and Siuslaw Indian Tribes* v. *The United States*, 87 C. Cls. 143. But where the consent to be sued is limited to a claim, or claims, arising under or growing out of a treaty, agreement, or act of Congress, proof of aboriginal use and occupancy title is not necessary where such treaties, agreements, or acts of Congress specifically provide or recognize that the land in respect of which claim is made has been or is set apart for the exclusive use and occupancy of the tribes concerned, or jointly for them and other tribes with their consent. *Shoshone Tribe* v. *United States*, 82 C. Cls. 23; 299 U. S. 476. In the case of a treaty title, the Indians concerned simply reserve, by specific recognition in the treaty, their original title to certain of their lands, or acquire exclusive use and occupancy title to other lands, in exchange for lands to which they had held original Indian Title. Where the consent to be sued is limited to claims arising under or growing out of a treaty, and the treaty relied upon is only a treaty of peace and amity and does not admit or recognize an exclusive use and occupancy title of the Indians to the lands in respect of which claim is made, the court is without authority to determine, adjudicate, and render judgment upon the basis of aboriginal Indian title. *Duwamish, et al. Tribes of Indians* v. *United States*, 79 C. Cls. 530.

The Crow Nation or Tribe of Indians of Montana v. *United States*, 81 C. Cls. 238, 269 U. S. 281; *The Wichita Indians, et al.* v. *United States, supra;* and *The Northwestern Bands of Shoshone Indians* v. *United States*, 95 C. Cls. 642, affirmed March 12, 1945, 324 U. S. —" (R. 70 72).

Recognition Shown by Enumerated Legislative and Executive Acts

Finding 20 (R. 50) recites that respondents had a *recognized* original Indian title and the opinion of the Court below pointed out that, although recognition was not necessary, both an Act of Congress and an opinion of the Attorney General had in fact directly recognized such title (R. 74).

Various acts of recognition either set up in the findings or in statutes and documents of which this Court takes judicial notice are enumerated as follows:

1. The Indian Trade and Intercourse Act of June 30, 1834, 4 Stat. 729, was extended over the territory of the Indian tribes of Oregon by the Act of June 5, 1850. That act contained in its title "for the extinguishment of their claims to lands." It provided for the appointment of Commissions to negotiate treaties with the several tribes for the extinguishment of their claims to lands lying west of the Cascade; provided for the appointment of a Superintendent of Indian Affairs and Indian Agents for the territory of Oregon; *and extended the law regulating trade and intercourse over the tribes* (Appendix pp. 18-20).

There was precisely the same situation as is so aptly described in the case of *United States* v. *Santa Fe Pacific RR. Co.*, 314 U. S. 339:

> "Certainly prior to 1865 any right of occupancy of the Walapais to the lands in question was not extinguished; nor was the policy of respecting such Indian title changed. The Indian Trade and Intercourse Act of

June 30, 1834, 4 Stat. at L. 729, chap. 161, was extended over 'the Indian tribes in the Territories of New Mexico and Utah,' by Sec. 7 of the Act of February 27, 1851, 9 Stat. at L. 574, 587, chap. 14. The 1834 Act which derived from the Act of July 22, 1790, 1 Stat. at L. 137, chap. 33, made it an offense to drive stock to range or feed 'on any land belonging to any Indian or Indian tribe, without the consent of such tribe' (Sec. 9, 25 U. S. C. A. Sec. 179); gave the superintendent of Indian affairs authority 'to remove from the Indian country all persons found therein contrary to law' (Sec. 10, 25 U. S. C. A. Sec. 220); made it unlawful to settle on 'any lands belonging, secured, or granted by treaty with the United States to any Indian tribe' (Sec. 11, 25 U. S. C. A. Sec. 180); and made invalid any conveyance of lands 'from any Indian nation or tribe of Indians.' Sec. 12, 25 U. S. C. A. Sec. 177. The Act of 1851 obviously did not create any Indian right of occupancy which did not previously exist. But it plainly indicates that in 1851 Congress desired to continue in these territories the unquestioned general policy of the Federal government *to recognize such right of occupancy.* As stated by Chief Justice Marshall in Worcester v. Georgia, supra (6 Pet. (U. S.) p. 557, 8 L. Ed. 499), *the Indian trade and intercourse acts* 'manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, *and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.*'" (*U. S. v. Santa Fe Pac. RR. Co.*, 314 U. S. 339 at 347, 348; 86 L. Ed. 260 at 270.) (Italics supplied.)

2. The passage of the Act of August 14, 1848 (9 Stat. 323) creating the territory of Oregon which contained in Sec. 1 thereof the following: nothing herein contained "shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory *so long as such* rights shall remain unextinguished by treaty * * *" (Appendix, pp. 17-18).

This act (Sec. 14) further provided that "the inhabitants of the territory (Oregon) shall be entitled to enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States north-west of the River Ohio by the Articles of Compact contained in the ordinance for the government of said territory" (Appendix 18).

This compact (Ordinance of 1787) provided "and should the public exigencies make it necessary for the common preservation to take any person's property or to demand his particular services, full compensation shall be made for the same." And further: "*The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress, but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them*" (Appendix, pp. 20-21).

3. The Opinion of the Attorney General on June 5, 1855 (7 Op. Atty. Gen. 293, 299):

> "There is one other idea suggested by the Commissioner of Indian Affairs, and the documents he communicates, as being current in Oregon, namely, that any white settler may rightfully take possession of any of the lands occupied by the Indians, and oust them prior to the extinguishment of their occupancy-title by the United States. This idea is too absurd to admit of reasoned reply. Suffice it to say that a white settler has the same right thus to oust the Indians as he has to oust white men, and no more; that is, the right to substitute robbery for purchase, and violence for law" (R. 74-75).

4. The quotation from the letter of the Commissioner of Indian Affairs to Joel Palmer, August 12, 1854 (Senate

Executive Document numbered 25, Fifty-third Congress, first session, p. 22):

> "Sir: You have been designated by the President of the United States as the officer of the Indian Department to negotiate treaties of peace *and acquisition* with the Indian tribes in Oregon, as provided for by a clause of the first section of the act of Congress approved July 31, 1854, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department.'
>
> "The clause referred to is as follows:
>
> " 'For the expenses of negotiating treaties with and making presents of goods and provisions to the Indian tribes in the Territory of Oregon, sixty-eight thousand dollars.'
>
> * * * * * * *
>
> "You will furnish me with a skeleton map of Oregon Territory, showing the *location of the different Indian tribes*, with the extent of territory claimed by each, and the nature of the tenure or claim, and as treaties are made designate the reserve provided for Indian use, with such precision that it may be laid down on the map here." (Italics supplied.) (See finding 5, R. 34, 35.)

5. The detailed report of Gen. Palmer showed who had title. It was his official duty under his appointment by the President (acting under authority of the Act of July 31, 1854) to ascertain the location of the several tribes of Indians who occupied and held possession thereof and to secure the signatures of the bands and tribes of Indians whose title to the lands was to be extinguished. His report was a recognition of the aboriginal possession *as to Respondent tribes who are given judgment here* for he describes their lands. (Senate Document numbered 25, Fifty-third Congress, first session, pp. 22 to 32.) (Finding 5, R. 34-35.)

This was approved by the Commissioner of Indian

Affairs who under the law had the responsibility thereunder in the following language:

> "The extent of country *to which the Indian title is by these articles relinquished* is estimated at about 5,000,000 acres, and the extent of the reservation at 750,000 to 800,000 acres. The reserve, it will be observed, lies within the limits reserved from sale by order of the President of the 9th of November, A. D., 1855." (Senate Document numbered 25, Fifty-third Congress, first session, p. 8.)

It was approved by the Secretary of the Interior and by the President when he sent it to the Senate with the treaty for consent to its ratification (R. 33).

6. There was also the *payment of earnest money*, under direction of Congress in keeping with the terms of the treaty. (Article 3 of the unratified treaty, R. 10.)

7. Annual Reports of the Commissioner of Indian Affairs officially communicated by the Secretary of Interior to Congress show many recognitions of the Indian title to the lands which the Court's opinion held belonged to Respondent Indian tribes. Some of these quotations from these annual reports are from the Superintendent of Indian Affairs, some from U. S. Indian Agents and some are the Commissioner's own language. We shall give only a few dates and quotations:

1863

> "• • • The Indians relying upon the promises made by the former Superintendent Palmer by whom the treaty was negotiated promptly removed to the stipulated reservation without awaiting the ratification of the treaty. They now complain and justly, that they have sold *all their former possessions which have been taken possession of by the whites* and that they have realized none of the benefit which they were assured would result from the treaty. • • •
>
> "• • • But as the Senate failed to ratify the treaty *the title to the whole territory above specified is still*

vested in the Indians, the white settlers thereon are but trespassers upon Indian lands" (Annual Rep. p. 9).

1862

"• • • They say 'they made a treaty with the government, *sold their lands, abandoned their country,* and in compliance with the stipulations of said treaty they removed to this reservation where they had continued to live and in doing so have fulfilled their part of the agreement but not so the government. On the contrary it never has ratified the treaty and has done nothing but pay them in promises for the land abandoned. This treaty they say was made many years ago and they have waited patiently for their Great Father to fulfill his promises but they cannot wait much longer.' *"I have done and said everything in my power to convince them that the government will yet fulfil its promises and act in good faith but all to no purpose"* (Annual Rep. p. 60).

1864

"• • • They abandoned large tracts of land to the United States, now occupied by the whites, and promptly removed upon the reserve proposed for their residence, and have since continued to reside upon it. • • •"

"• • • *They were induced to remove to the reservation by late Superintendent Joel Palmer in 1855 and a treaty for the purchase of their lands concluded.* The senate failed to ratify the treaty and they have consequently never received anything under it. But their part of the stipulation have all been complied with. *They gave up their lands* and they have since been occupied by whites. • • •" (Italics supplied.)

"• • • They have waited anxiously for ten years for the fulfilment of the promises made to them *when they surrendered their lands to the United States"* (Annual Rep. p. 11).

1867

"• • • *They then ceded their lands* and removed to the Coast reservation, (Siletz agency,) expecting that

the government would fulfil its part in carrying into effect the stipulations of that treaty; but in this they have been greatly disappointed. * * *"

"* * * By the terms of the treaty *the Indians ceded all their lands,* and agreed to remove to the coast reservation; in consideration the government promised to pay certain annuities, to build mills, provide schools, physicians, open farms, erect buildings, &c. This treaty the Senate refused to ratify, and it has therefore not been held to be binding upon the United States; but the Indians fully complied with the terms of their side of the treaty, abandoned their lands, removed to the reservation designated for them, and have, with few exceptions, remained there since. White settlers occupied their lands, and still occupy them. The Indians complain, and justly I think, that having complied with their side of the treaty, we ought to comply with ours * * *" (Annual Rep. p. 7).

1871

"As an officer of the United States Indian Department, I demand, in behalf of the Indians of Oregon, that their rights be regarded, and justice done them in some way, either by paying them *for their lands,* or allowing them to locate homes in common with the white men, who are making the Indian country so valuable. This subject is one that concerns the welfare of thousands of white people settled on the lands still claimed by these Indians. The importance of prompt action is manifest, when it is known that some of them have already taken council of able lawyers, who give them encouragement to prosecute their claims. * * *" (Annual Rep. p. 721). (All italics supplied.) (See Finding 12, p. 40, second par.)

These are documents of which this Court takes judicial notice. They were introduced as a chain in the proof of occupancy. However, they also show recognition of the most definite kind.

They constitute abundant recognition of the Indians' title to the lands from which they had been dispossessed

and as was said about similar reports in a case in the Supreme Court, "these reports were officially communicated by the Secretary of the Interior to Congress and there is nothing to show any disapproval. * * *" *Donnelly* v. *U. S.*, 228 U. S. 243 at 258, 57 L. Ed. 820 at 826.

Conclusion

Respondents had the original Indian title "as sacred and as securely safeguarded as is a fee simple absolute title." This was shown when the proof was made of their aboriginal possession and occupancy. Recognition though not necessary has been shown. That the Government took it for its own public use without compensation is admitted. Respondents lacked only the authority to sue the Government. This the jurisdictional act gave in unequivocal language.

We respectfully submit that the judgment should be affirmed.

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